

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN 25 2007

COURT OF APPEALS
DIVISION TWO

LEE ANNE A.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY,
ALEAH M., and ALYSSE M.,

Appellees.

2 CA-JV 2006-0022

DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16383300

Honorable Theodore J. Knuck, Judge Pro Tempore

AFFIRMED

Joan Spurney Caplan

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

V Á S Q U E Z, Judge.

¶1 In this appeal, appellant Lee Anne A. challenges the juvenile court's May 2006 order terminating her parental rights to her children, Aleah, born June 18, 1996, and Alysse, born July 3, 1998, on the grounds of abuse or neglect, A.R.S. § 8-533(B)(2), and removal of the children from her legal custody within eighteen months of their having been returned to her after a previous removal and court-ordered placement out of the home, § 8-533(B)(11). We affirm for the reasons stated below.

¶2 In July and August 2002, Child Protective Services (CPS) received reports that Aleah and Alysse were not being cared for by Lee Anne and her husband, Earl M.¹ CPS received a similar report in January 2003. A month later, police and CPS began investigating reports of domestic violence, illegal drug use by the parents and others in the home, and possible sexual abuse of the children. Lee Anne admitted to the CPS investigator that she knew Alysse had claimed a person who had been allowed to stay in the family apartment had sexually abused her, that Lee Anne had not sought medical or other assistance for Alysse, and that Lee Anne had left the children with a person whose own children had been removed from her custody by CPS because she was addicted to heroin. CPS removed the children at the end of February 2003, and the Arizona Department of Economic Security (ADES) filed a dependency petition.

¹The juvenile court terminated Earl's parental rights in the same order. Although Earl appealed and his appeal was consolidated with Lee Anne's appeal, his appeal was later dismissed.

¶3 Aleah, Alysse, and Lee Anne’s son Christopher, born November 9, 1989, were adjudicated dependent as to Lee Anne in April 2003 after she admitted the allegations of the dependency petition. Because she complied with the case plan requirements for reunification, the children were returned to Lee Anne, and the juvenile court granted ADES’s motion to dismiss the dependency proceeding in October 2004. In January 2005, however, police officers removed the children from the home after raiding it and arresting Lee Anne and Earl for possession of crack cocaine. ADES filed a second dependency petition, and in April 2005, all three children were adjudicated dependent as to both parents after they pled no contest to the allegations in the dependency petition. In November, ADES filed a motion to terminate the parents’ rights to Aleah and Alysse. ADES alleged Lee Anne had neglected or willfully abused the children, § 8-533(B)(2); the children had been removed from her custody, returned to Lee Anne, and removed again within eighteen months; and she could not discharge her parental responsibilities, § 8-533(B)(11). In May 2006, after a five-day trial, the juvenile court found ADES had proved by clear and convincing evidence both grounds for terminating Lee Anne’s parental rights and that termination of her rights was in the children’s best interests.

¶4 Section 8-533(B)(2) provides a parent’s rights may be terminated if “the parent has neglected or wilfully abused a child. This abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.” In its order terminating the parents’ rights, the court

found disjunctively that Lee Anne had abused or neglected the children, tracking the language of § 8-533(B)(2). The court added that “[t]he abuse or neglect of the children has caused substantial risk of harm to the children’s health or welfare,” which appears to have been based primarily on the definition of neglect in A.R.S. § 8-201(21). Lee Anne contends there was no substantial evidence to support the juvenile court’s finding that she had neglected or willfully abused the children and, therefore, that the evidence was insufficient to support the termination of her rights under this subsection of the statute.

¶5 We will not disturb an order terminating a parent’s rights based on a claim of insufficient evidence unless the order is clearly erroneous. *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). So long as there is reasonable evidence to support the order and the findings upon which it is based, we will affirm it. *Audra T. v. Ariz. Dep’t of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). In determining whether the evidence supports the juvenile court’s order, we are mindful that because the juvenile court, as the trier of fact, is in the best position to weigh the evidence, we defer to its findings and do not reweigh the evidence. *Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, ¶ 8, 83 P.3d 43, 47 (App. 2004).

¶6 Neglect is defined in § 8-201(21) as “the inability or unwillingness of a parent . . . of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes substantial risk of harm to the child’s health or welfare.” The record contains an abundance of evidence supporting the court’s finding that

Lee Anne neglected the children. That neglect began in 2002, when CPS received reports that the parents were not adequately supervising the children. The reports in January 2003 were similar; the children were not being supervised or fed and were going to school dirty. And, in February, it was reported that the children were being sexually abused and that the parents were exposing them to illicit drugs, which the parents were using.

¶7 CPS investigator Rosemary Segura subsequently interviewed two individuals in whose care the parents had left the children. One, whose name was Sunshine, admitted she had been diagnosed as suffering from bipolar disorder and had been medicating herself for the disorder by using crack cocaine. Segura spoke to Aleah's school's social worker in January 2003, who reported her concerns that Aleah was being neglected because the child was "disheveled and unclean, sometimes hungry." The social worker told Segura she had been concerned the children were not being supervised properly and had called the police because then four-year-old Alysse "had wandered away from the apartment complex and found herself on the school property."

¶8 Alysse told Segura she had been sexually abused by her mother's friend at the family's apartment while her mother was at Sunshine's house. Alysse said she had told her mother. Aleah reported during a forensic interview that her parents slept all the time, that her mother had told her not to talk about any alleged sexual abuse or she would be in trouble, and that people came to the home to buy drugs from her father. Lee Anne admitted

to Segura and to a police officer that she had not sought medical or psychological help for Alysse after Alysse told her she had been molested.

¶9 Lee Anne appeared to be getting control of her life at one point, obtaining drug treatment, and trying to protect the children from Earl by filing a petition for the dissolution of her marriage. The juvenile court returned the children to Lee Anne in February 2004, but because she had allowed the children to have unsupervised contact with Earl, the children were removed again approximately one month later. In August 2004, the children were again returned to Lee Anne on the condition that Earl remain out of the home and have no contact with the children. But, only four months later, in October, police found the children in the home with Lee Anne and Earl. Officer Jamie Mills testified at the severance trial that there had been “a struggle involving a knife” between Earl and another man; a crack pipe had been found on the table, which Earl admitted was his; and the children had been scared, crying, and “extremely upset.” Nevertheless, the court dismissed the dependency proceeding later that month.

¶10 The day after the proceeding was dismissed, Lee Anne allowed Earl to move back into the home. He soon began using crack cocaine, and the parents allegedly allowed Lee Anne’s fifteen-year-old son Christopher to smoke it. CPS received a report in December 2004 that Lee Anne, Earl, and Christopher were using crack cocaine; Lee Anne was prostituting herself in the home; the children were wandering outside unsupervised and had access to drug paraphernalia; and there was no food in the home. Lee Anne admitted to

police she had begun prostituting herself and using drugs as soon as the first dependency proceeding was dismissed.

¶11 CPS investigative case manager Clare Aylward testified she had been assigned the case in January 2005. She interviewed Alysse and Aleah, but the parents would not allow her to interview Christopher. Both children told Aylward the parents kicked and hit each other and fought a lot. Aleah recalled that when she had been six years old, about two years earlier, she had called the police because her father was hitting her mother. Aleah told Aylward, “Alysse still drinks beer,” and had done so since she was four. Aleah also told Aylward that “CPS got out of her life October 23rd, and my dad moved back in October 24th.” Alysse told Aylward CPS previously had removed her and her sister from the home because “one of her dad’s friends had licked her private parts.” And she recalled her father had tried to kill her mother, “and the police broke down the door.”

¶12 Aylward had contact with Lee Anne five times in January 2005. When asked to describe Lee Anne’s “level of concern about the children,” Aylward responded, “I would say mother’s level of concern was nearly zero.” The first contact on January 12 was with both parents. Aylward testified she had gone to the home and neither parent would allow her inside. She added, “[I]n a very violent way, [Lee Anne] said she’d never accept any CPS services. She wanted nothing to do with me, CPS.” Aylward stated, “I rarely see that level of just escalated hostility in parents. Really stands out when it does happen.” The next contact was a telephone call initiated by Lee Anne after the children had been removed;

police officers and a Special Weapons and Tactical team raided Lee Anne's home on January 13 and arrested Lee Anne and Earl. Lee Anne called Aylward to say she had been living in various motels. Aylward told Lee Anne they needed to discuss drug testing and visitation, but, Aylward testified, Lee Anne "said her primary concern at that time . . . [was] getting money to ba[il] the father out of jail. And she did not ask one question about the welfare of the children. She did not ask to see her children."

¶13 Two days before the raid, Tucson Police Officer Nancy Fatura had interviewed a woman who stated she had gone to Lee Anne's home to smoke crack cocaine. The woman told the officer people smoked crack cocaine in front of the children. Officers who entered Lee Anne's home found illegal drugs and drug paraphernalia mixed in "children's candy," pornographic videotapes in the same box as a children's videotape, and a .22 caliber rifle that was accessible to the children. Officer Mark Schur testified at the severance hearing that when he had gone into the master bedroom, he had seen Alysse standing next to the bed on top of which was a black revolver; the rifle was on the floor, wrapped in a blanket.

¶14 This evidence overwhelmingly established Lee Anne had repeatedly neglected the children, which resulted in their being removed from the home three times, twice during the first dependency proceeding and a final time in January 2005; the latter removal precipitated the second dependency proceeding and ADES's filing of the motion to terminate her parental rights. The evidence showed Lee Anne had failed to provide the children basic needs, failed to adequately supervise them, and perhaps most egregious, had

failed repeatedly to protect them from an environment plagued by violence, illegal drug use, and sexual abuse of one or possibly both girls. Lee Anne put the children in the care of a person whom she knew had lost custody of her own children. Lee Anne left them with Earl, even in March 2004, despite his lengthy history of violence. And, even though the children were returned to Lee Anne in August 2004 on the condition that she not allow Earl to have contact with them and despite the children's therapist's insistence that the children have no contact with him, police found the children and Lee Anne with Earl in October 2004. The evidence supports the juvenile court's finding that ADES had sustained its burden of establishing with clear and convincing evidence that Lee Anne had demonstrated an "inability or unwillingness . . . to provide th[e] child[ren] with supervision, food, clothing, shelter or medical care," causing "substantial risk of harm to the child[ren]'s health or welfare. § 8-201(21).

¶15 Lee Anne concedes that "[o]ne or possibly both children were probably sexually abused, at least on one occasion." But, she suggests she is somehow exonerated because it "was not with the knowledge, connivance or approval of either parent." What she fails to see is that her culpability is derived from a failure to protect the children by making poor decisions about their care and placing them in physically and emotionally dangerous and harmful environments. And she failed to respond appropriately to at least Alysse's report that she had been molested. These omissions were a form of neglect.

¶16 Lee Anne insists the evidence did not sufficiently establish that the neglect exposed the children to “substantial risk of harm.” § 8-201(21). And she suggests that it is because she is impoverished that she is unable to provide the children with certain “amenities considered necessary by middle class parents.” But the evidence established more than that the children were simply deprived of certain “amenities.” The evidence showed they were neglected as a result of Lee Anne’s failure to provide them a safe environment. Her poverty is not an excuse for exposing the children to repeated violence, failing to provide them adequate food and shelter at times, and exposing them to a variety of dangerous conditions, including an environment dominated by illegal drug use, where drugs and weapons were within their reach.² As psychologist Ralph Wetmore testified at the severance trial, the family’s financial resources were limited, and the limited amount they had they spent on illegal drugs. Because of this, he questioned “whether or not [the mother and father] were providing for the basic needs of the children in terms of” clothing, food, and medical and dental care.

¶17 Lee Anne concedes on appeal she has “abused drugs and alcohol for many years.” But, she claims, that alone “does not constitute neglect.” We agree. She also concedes that drug abuse might be neglect if it exposed the children to a substantial risk of harm, but she insists “no evidence to this effect was presented.” The record belies this

²The children’s therapist testified the children had told her after they had been removed from their mother’s home in January 2005 that Alysse had been “playing with a gun on the ground. She was wa[]ving it around with her finger.”

contention. In addition to evidence discussed above, Dr. Wetmore, who evaluated Lee Anne a second time in May 2005, stated in his report that Lee Anne's "involvement with crack cocaine would preclude the adequate care of the three children in the home." He stated she had "demonstrated a consistent pattern of irresponsibility regarding her parental responsibilities," including a failure to "provide[] for the physical, emotional or mental health and welfare of these children," as demonstrated by her continued involvement with Earl, which "ha[d] only further harmed the children." Dr. Wetmore previously had diagnosed her as suffering from cocaine dependence and personality disorders, to which he added in 2005 "neglect of a child." He stated the children "would continue to be at risk of further abuse and/or neglect" if left in her care. And he testified at the severance trial that Lee Anne had admitted she and Earl would use drugs and then leave the children with a neighbor or in day care until the evening so they could continue to use drugs. Dr. Wetmore concluded that the parents chose to use drugs instead of caring for the children.

¶18 The children's therapist testified the parents had exposed the children to a life of drugs and violence and they were afraid to return to it. She had seen the children between April 2003 and November 2004 and again beginning in January 2005 through the early 2006 severance trial. She testified, as did Dr. Wetmore, that Lee Anne had not been able to put the children's needs ahead of her own need to use illegal drugs and, she added, Lee Anne's need to keep Earl in her life. In her opinion, the parents had "neglected their children's needs by not protecting them."

¶19 Lee Anne’s other arguments about the sufficiency of the evidence relate primarily to the evidence regarding abuse. She contends, for example, the statutory definition of abuse requires evidence of physical injury, impairment of body function, or disfigurement, and that any emotional damage must be established by a medical doctor or licensed psychologist. *See* § 8-201(2). As we previously stated, the juvenile court found Lee Anne had abused *or* neglected the children; the finding, like the statute, is stated in the disjunctive. Consequently, that she had neglected the children was a sufficient, independent ground for terminating her parental rights. We need not address the arguments directed at the sufficiency of the evidence to support the finding that she had abused the children.

¶20 Similarly, we need not address Lee Anne’s argument that § 8-533(B)(11) is unconstitutionally vague, ambiguous, or overbroad and that its application here resulted in fundamental error. “If clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds.” *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 3, 53 P.3d 203, 205 (App. 2002); *see also Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000). Because sufficient evidence supports the juvenile court’s order on the ground that Lee Anne had neglected the children, we affirm the order.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge